

In 2005 the Kentucky General Assembly passed Senate Bill 113 in response to recent federal legislation. Senate Bill 113 changes Kentucky's successorship laws (KRS 341.540) and may affect some Kentucky businesses. Senate Bill 113 spells out the details and the consequences of these changes. It is important that all Kentucky employers read and understand this legislation, because there are possible penalties associated with non-compliance with the new law. In addition, employers should notify their legal counsel, accountants, personnel managers and any other parties representing them in unemployment insurance tax matters of this bill and should refer them to this web site for the complete text of the law.

AN ACT relating to unemployment insurance.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 341.540 is amended to read as follows:

(1) *As used in this section, unless the context clearly requires otherwise:*

(a) "Substantially common" or "substantially the same" means that one (1) or more individual or individuals own or exercise pervasive management or control over both the predecessor and successor employing unit. Factors indicating pervasive management or control include, but are not limited to, whether the predecessor and successor share:

1. One (1) or more individuals or family members in positions of management or ownership, on boards of directors, or as shareholders or executive or other officers; and

2. Titles to property, parent companies, workforce, assets, legal and professional representation, physical location, client pools, marketing services, Web sites, telephone numbers, or e-mail addresses;

(b) "Trade" or "business" includes the employing unit's workforce;

(c) "Knowingly" means having actual knowledge of, or acting with deliberate ignorance or disregard for, the prohibition involved; and

(d) "Violates" or "attempts to violate" includes, but is not limited to,

intended evasion, misrepresentation, or willful nondisclosure.

(2) For the purpose of this chapter, if a subject employer transfers all or part of its trade or business to another employing unit, the acquiring employing unit shall be deemed a successor if the transfer is in accordance with administrative regulations promulgated by the secretary, or if the transferring and acquiring employing units have substantially the same ownership, management, or control. If an employing unit is deemed a successor, the transferring employing unit shall be deemed a predecessor.

(3) Any successor to the~~employing unit which succeeds to or acquires the organization,~~ trade~~,~~ or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including interest, and shall continue the payment of all contributions and interest due under this chapter, except that the successor~~or acquirer~~ shall not be required to assume the liability of any delinquent contributions and interest of a predecessor or predecessors unless the cabinet notifies the successor~~or acquirer~~ of the delinquency within six (6) months after the department has notice of the succession~~or acquisition~~.

(4)~~(2)~~ The liability for delinquent contributions and interest imposed upon the successor~~or acquirer~~ by subsection (3)~~(1)~~ of this section shall be secondary to the liability of the predecessor or predecessors, and if the delinquency has been reduced to judgment, the order of execution on the judgment shall be as follows:

- (a) Against the assets, both real and personal, of the predecessor or predecessors;
- (b) Against the assets, both real and personal, of the business acquired; and
- (c) Against the assets, both real and personal, of the successor or acquirer.

(5) (a)~~(3)~~ Notwithstanding the provisions of subsection (3) *of this*

~~section~~⁽¹⁾, any successor to a~~employing unit which succeeds to or acquires a segregable and identifiable~~ portion of the ~~organization,~~ trade~~,~~ or business ~~off from~~ a subject employer, ~~and~~ who is, or by reason of the transfer~~succession or acquisition~~ becomes, a subject employer, shall assume the ~~position of an employer with respect to the~~ resources and liabilities of the predecessor's reserve account in proportion to the percentage of the payroll or employees assignable to the transferred portion. In calculating the transferred portion, the secretary shall utilize the last four (4) calendar quarters~~,~~ preceding the date of transfer~~succession or acquisition,~~ for workers employed by the successor subsequent to that date. The taxable payroll, benefit charges and the potential benefit charges shall ~~likewise~~ be assumed by the successors ~~or acquirers in interest~~ in a like proportion.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, if any employing unit succeeds to a portion of the trade or business of another employing unit; becomes, by reason of that succession, a subject employer with substantially the same ownership, management, or control as the predecessor employing unit; and lays off or terminates more than one-half (1/2) of the original employees transferred within six (6) months of the date of transfer; then the succession and creation of the new employing unit shall be voided, and the benefits attributable to the layoffs or terminations shall be charged to the reserve account of the original employing unit.

(6)⁽⁴⁾ (a) The contribution rate of a successor ~~or acquirer employing unit,~~ whether in whole or in part, which was a subject employer prior to ~~such~~ succession ~~or acquisition~~, shall not be affected by the transfer of the reserve account for the remainder of the rate year in which ~~such~~

succession~~[or acquisition]~~ occurred; *except that the rate of the successor shall be recalculated and made effective upon the first day of the calendar quarter immediately following the date of the transfer if there is substantially common ownership, management, or control of the predecessor and successor.*

- (b) The contribution rate of a successor~~[or acquirer employing unit, either]~~ in whole or in part, which was not a subject employer prior to~~[such]~~ succession~~[or acquisition]~~, shall be, for the calendar year in which~~[such]~~ succession~~[or acquisition]~~ occurred, the same rate as that of its predecessor; *except if the secretary finds, after a thorough investigation based on the use of objective factors, including but not limited to:*

- 1. The cost of acquiring the business;*
- 2. How long the original business enterprise was continued; and*
- 3. Whether a substantial number of new employees were hired for performance of duties unrelated to the business activity prior to acquisition;*

that the succession was solely for the purpose of obtaining a rate lower than that prescribed in KRS 341.270(1) and 341.272 for a new employing unit, then the unemployment experience of the predecessor shall not be transferred, the rate for a new employing unit shall be assigned, and the employing unit shall be otherwise deemed a successor for the purpose of KRS 341.070(7) and subsection (3) of this section.

- (c) The contribution rate for a successor~~[or acquirer employing unit,]~~ which *becomes a subject employer through the simultaneous transfer, either in whole or in part,*~~[was not a subject employer prior to the simultaneous succession to or acquisition]~~ of two (2) or more predecessor reserve accounts~~[, either in whole or in part,]~~ shall be the rate determined in

accordance with the provisions of KRS 341.270, by combining the reserve accounts succeeded to~~[-or-acquired-as-they-existed]~~ as of the computation date for determining rates for the calendar year in which~~[-such]~~ succession~~[-or-acquisition]~~ occurred.

- (d) The contribution rate of a successor~~[-or-acquirer-employing-unit]~~ which succeeds~~[-to-or-acquires]~~, either in whole or in part, to a predecessor's reserve account after a computation date, but prior to the beginning of the calendar year immediately following ~~that~~^{such} computation date, shall be the rate determined~~[-]~~ in accordance with KRS 341.270, by effecting the transfer of ~~the~~^{the} reserve account as of the computation date immediately preceding the date of~~[-such]~~ succession~~[-or-acquisition]~~.

- (7) Notwithstanding KRS 341.270, the contribution rate for an employing unit that knowingly violates or attempts to violate the provisions of this section or any other provision of the chapter related to determining the assignment of a contribution rate shall be the highest rate assignable under this chapter for the calendar year during which the violation or attempted violation occurred and the three (3) calendar years immediately following that year. If that employer's rate is already at the highest assignable rate, or if the amount of increase in the employer's rate would be less than an additional two percent (2%) for that year, then a penalty rate of contributions of an additional two percent (2%) of taxable wages shall be imposed for each year.
- (8) In addition to the penalties prescribed in subsection (7) of this section and subsection (9) of Section 2 of this Act, any person who knowingly violates this section shall be subject to the penalties stipulated under KRS 341.990.
- (9) The secretary shall establish procedures to identify the transfer of a business for purposes of this section.

Section 2. KRS 341.990 is amended to read as follows:

- (1) Any employee of any state department who violates any of the provisions of KRS 341.110 to 341.230 shall be guilty of a Class B misdemeanor.
- (2) Any person subpoenaed to appear and testify or produce evidence in an inquiry, investigation, or hearing conducted under this chapter who fails to obey the subpoena shall be guilty of a Class B misdemeanor.
- (3) Any subject employer, or officer or agent of a subject employer, who violates subsection (1) of KRS 341.470 shall be guilty of a Class A misdemeanor.
- (4) Any person who violates subsection (2) of KRS 341.470 shall be guilty of a Class A misdemeanor.
- (5) Any person who knowingly makes a false statement or representation of a material fact or knowingly fails to disclose a material fact to the secretary to obtain or increase any benefit under this chapter or under an employment security law of any other state, or of the federal government, either for himself or for any other person, business entity, or organization shall be guilty of a Class A misdemeanor unless the value of the benefits procured or attempted to be procured is one hundred dollars (\$100) or more, in which case he shall be guilty of a Class D felony.
- (6)
 - (a) Any person who knowingly makes a false statement or representation, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any worker entitled thereto, or to avoid becoming or remaining subject to this chapter, or to avoid or reduce any payment required of an employing unit under this chapter shall be guilty of a Class A misdemeanor unless the liability avoided or attempted to be avoided is one hundred dollars (\$100) or more, in which case he shall be guilty of a Class D felony.
 - (b) Any person who willfully fails or refuses to furnish any reports required, or to produce or permit the inspection or copying of records required in

this chapter shall be guilty of a Class B misdemeanor. Each such false statement, representation or failure and each day of failure or refusal shall constitute a separate offense.

(7) In any prosecution for the violation of subsection (5) or (6) of this section, it shall be a defense if the person relied on the advice of an employee or agent of the department.

(8) Any person who willfully violates any provision of this chapter or any rule or regulation under it, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which no specific penalty is prescribed in this chapter or in any other applicable statute, shall be guilty of a violation. Each day the violation continues shall constitute a separate offense.

(9) In addition to the higher rates imposed under subsection (7) of Section 1 of this Act, any person, whether or not an employing unit, who knowingly advises or assists an employing unit in the violation or attempted violation of Section 1 of this Act or any other provision of this chapter related to determining the assignment of a contribution rate shall be subject to a civil monetary penalty of not less than five thousand dollars (\$5,000).

(10) Proceeds from all penalties imposed under subsection (9) of this section and Section 1 of this Act shall be deposited in the unemployment compensation administration account and shall be expended solely for the cost of administration of this chapter consistent with KRS 341.240.